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Kaliammah a/p Muthu v Valee a/p Karuppen

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(NCVC)W-1906–10 OF 2016
ROHANA YUSUF, VERNON ONG AND HASNAH HASHIM JJCA
5 SEPTEMBER 2017

C *Trusts and Trustees — Resulting trust — Whether sufficient evidence — Mother sued her three children who were joint owners of property contending they held property on trust for her — Mother contended she paid substantial sum as advance payment for acquisition of the property but could not prove allegation — Two of the joint owners entered into consent judgment agreeing they held property on trust*
D *for the mother and consented to their shares being transferred to her — Whether consent judgment had any impact upon dispute between mother and remaining daughter-joint owner ('the appellant') — Whether evidence that appellant paid towards purchase price of the property and serviced the monthly loan payments not disputed — Whether mother's statement of claim and evidence at trial failed to*
E *show any intention to create a trust over the property in her favour — Whether mother failed to challenge appellant's title to property under s 340(2) of the National Land Code — Whether appellant had therefore acquired indefeasible title to the property*

F The appellant (who was the respondent's daughter) and her two siblings jointly owned a landed property ('the property') which they bought for RM120,000 after taking a loan from a financial institution. Claiming that she had paid the major portion of an initial payment of RM60,000 for the purchase of the property, the respondent sued the three joint owners in the High Court for,
G inter alia, a declaration that they held the property on trust for her and also for an order that she be registered as the sole owner of the property. During the case management of the suit, the appellant's two siblings-cum-defendants entered into a consent judgment ('the consent judgment') with the respondent stating that they held the property on trust for the respondent and agreeing to an order
H that their shares in the property be registered in the respondent's name. The trial between the respondent and the appellant proceeded. At the conclusion of the trial, the High Court decided in favour of the respondent although it found that neither party had adduced any documentary proof to support their respective contentions over who had paid the advance monies for the purchase
I of the property. After considering the consent judgment, the trial judge ruled that the respondent had made the initial payments towards the purchase of the property, that she was its beneficial owner and that the appellant, like her siblings, were mere nominal owners who held no beneficial rights over the property but held it on a resulting trust in favour of the respondent. At the

hearing of the instant appeal against the decision, the appellant argued that she had contributed to the purchase price of the property and had paid the loan repayment instalments and that therefore the legal and beneficial ownership in the property accrued to her. The appellant said the consent judgment had no consequence to her dispute with the respondent; that the trial judge erred in finding the existence of a resulting trust when there was no pleading or evidence to that effect and that the respondent had also failed to challenge the appellant's indefeasible title to the property under the National Land Code ('the NLC').

Held, allowing the appeal and setting aside the orders of the High Court:

(1) The trial judge failed to consider that the circumstances expressly provided for in s 340(2) of the NLC were not pleaded by the respondent to impugn the appellant's legal title. There was no allegation by the respondent that the appellant had acquired title to the property by fraud, misrepresentation or forgery. The trial judge had instead questioned the appellant's title based on other considerations. Since the appellant's title had not, at any point of time, become defeasible by reason of s 340(2) of the NLC or other grounds of equity, it remained untainted and, thus, indefeasible. Being indefeasible, the appellant's claim to one-third share in the property was unimpeachable under s 340 of the NLC (see paras 21 & 24).

(2) The respondent's statement of claim was barren of any particulars of an intention to create a trust in her favour. A clear intention to create a trust had to be established. The onus was on the respondent to prove strictly on preponderance of evidence the exact intention of the parties at the time the property was purchased. There was not an iota of evidence to show an intention to create a trust over the property in the respondent's favour. Even though there was no documentary proof, the trial judge believed the respondent had paid RM40,000 towards the purchase of the property and that the appellant had merely contributed RM7,000. But the appellant had testified that she had paid RM60,000 and had serviced the monthly loan payments. There was no dispute that the appellant had contributed towards the purchase price (see paras 26, 28–29 & 33).

(3) The trial judge erred in finding that the consent judgment had strengthened the case that the appellant held the property on trust for the respondent. The consent judgment had no consequence or impact on the appellant's legal and beneficial rights over the property. On the evidence, it was not disputed that the appellant had contributed to the purchase price. Accordingly, she was vested with both the legal and beneficial ownership of the property (see paras 33–35).

[Bahasa Malaysia summary

Perayu (yang mana adalah anak perempuan responden) dan dua saudaranya memiliki bersama hartanah ('hartanah tersebut') yang mana mereka beli bagi sejumlah RM120,000 selepas mengambil pinjaman daripada institusi kewangan. Mendakwa bahawa dia telah membayar sebahagian besar bayaran permulaan sejumlah RM60,000 bagi pembelian hartanah tersebut, responden menyaman ketiga-tiga pemilik bersama di Mahkamah Tinggi untuk, antara lain, perisytiharan bahawa mereka memegang hartanah tersebut atas amanah untuknya dan juga untuk perintah bahawa dia didaftarkan sebgai pemilik tunggal hartanah tersebut. Semasa pengurusan kes tindakan, dua saudara perayu merangkap defendan-defendan memasuki perjanjian izin ('perjanjian izin tersebut') dengan responden menyatakan bahawa mereka memegang hartanah tersebut atas amanah untuk responden dan bersetuju kepada perintah bahawa bahagian mereka di dalam hartanah tersebut di daftarkan di atas nama responden. Perbicaraan di antara responden dan perayu diteruskan. Pada akhir perbicaraan, Mahkamah Tinggi memutuskan memihak kepada responden walaupun ia mendapati bahawa kedua-dua pihak tidak mengemukakan apa-apa bukti dokumentar untuk menyokong hujahan mereka masing-masing ke atas siapa yang telah membayar wang muka untuk pembelian hartanah tersebut. Selepas mempertimbangkan penghakiman izin, hakim perbicaraan memutuskan bahawa responden telah membuat bayaran permulaan kepada pembelian hartanah tersebut, bahawa dia adalah pemilik benefisialnya dan bahawa perayu, seperti saudara-saudaranya, adalah hanya pemilik nominal yang tidak memegang hak benefisial ke atas hartanah tersebut tetapi memegangnya atas amanah berbangkit yang memihak responden. Semasa pendengaran rayuan ini terhadap keputusan tersebut, perayu berhujah bahawa dia telah menyumbang kepada harga pembelian hartanah tersebut dan telah membayar bayaran ansuran semula pinjaman dan bahawa oleh itu pemilik sah dan benefisial ke atas hartanah tersebut terakru kepadanya. Perayu menyatakan penghakiman izin tersebut tidak mempunyai kesan kepada pertikaiannya dengan responden; bahawa hakim perbicaraan tersilap dalam mendapati kewujudan amanah berbangkit apabila tidak terdapat pliding atau keterangan kepadanya dan bahawa responden juga telah gagal untuk mencabar hak milik tak boleh sangkal kepada hartanah tersebut di bawah Kanun Tanah Negara ('KTN').

Diputuskan, membenarkan rayuan dan mengenepikan perintah-perintah Mahkamah Tinggi:

(1) Hakim perbicaraan gagal untuk mempertimbangkan bahawa keadaan yang diperuntukkan secara nyata di dalam s 340(2) KTN tidak diplidkan oleh responden untuk mempersoalkan hakmilik sah perayu. Tidak terdapat dakwaan oleh responden bahawa perayu telah memiliki hakmilik kepada hartanah tersebut secara fraud, salah nyata atau pemalsuan. Hakim perbicaraan telah sebaliknya menyoal hakmilik

perayu berdasarkan atas pertimbangan lain. Memandangkan hakmilik perayu tidak, pada bila-bila masa, menjadi boleh disangkal atas alasan s 340(2) KTN atau alasan-alasan ekuiti lain, ia kekal tidak dicemar dan, oleh itu, tak boleh disangkal. Oleh kerana hakmilik tidak boleh disangkal, tuntutan perayu kepada bahagian satu pertiga ke atas hartanah tersebut tidak dapat disangsikan di bawah s 340 KTN (lihat perenggan 21 & 24).

(2) Penyataan tuntutan responden tidak mempunyai apa-apa butiran tentang niat untuk membentuk amanah bagi memihaknya. Niat jelas untuk membentuk amanah perlu dibuktikan. Beban adalah ke atas responden untuk membuktikan dengan tegas atas banyak keterangan niat sebenar pihak-pihak pada masa hartanah tersebut dibeli. Tidak terdapat sedikit pun keterangan untuk menunjukkan niat untuk membentuk amanah ke atas hartanah memihak kepada responden. Walaupun tidak terdapat bukti dokumentar, hakim perbicaraan percaya bahawa responden telah membayar RM40,000 kepada pembelian hartanah tersebut dan bahawa perayu hanya menyumbang sejumlah RM7,000. Tetapi perayu telah memberi keterangan bahawa dia membayar RM60,000 dan telah membayar bayaran pinjaman bulanan pinjaman tersebut. Tidak terdapat pertikaian bahawa perayu telah menyumbang kepada harga belian (lihat perenggan 26, 28–29 & 33).

(3) Hakim perbicaraan tersiap dalam mendapati bahawa penghakiman izin telah mengukuhkan kes tersebut bahawa perayu memegang hartanah tersebut atas amanah untuk responden. Penghakiman izin tidak mempunyai kesan ke atas hak sah dan benefisial perayu ke atas hartanah tersebut. Atas keterangan, ia tidak dipertikaikan bahawa perayu telah menyumbang kepada harga pembelian tersebut. Dengan itu, dia diletakhak dengan kedua-dua pemilikan sah dan benefisial terhadap hartanah tersebut (lihat perenggan 33–35).]

Notes

For cases on resulting trust in general, see 12(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3380–3444.

Cases referred to

Heng Gek Kiau v Goh Koon Suan [2007] 6 CLJ 626, CA (refd)

Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors [2014] 2 MLJ 768; [2014] 1 CLJ 987, FC (refd)

Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (folld)

Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1; [2010] 2 CLJ 269, FC (refd)

Legislation referred to

National Land Code s 340, 340(1), (2), Forms 14A, 16A

Appeal from: Civil Suit No 22NCVC-15–02 of 2015 (High Court, Pulau Pinang)

Simon Murali (Phee, Chen & Ung) for the appellant.
V Amareson (Amareson & Meera) for the respondent.

Hasnah Hashim JCA:

[1] The appeal before us was against the decision of the learned judicial commissioner in the Pulau Pinang High Court given on 9 September 2016 allowing the plaintiff's claim against the second defendant. We had, after perusing the records of appeal as well as considering the written and oral submissions of learned counsels unanimously allowed the appeal with no order as to costs. We set aside the High Court and ordered that the deposit to be refunded to the appellant. We now give our reasons for the decision.

[2] For the purpose of this judgment, the parties will be referred to as they were referred to in the High Court.

SALIENT FACTS

[3] The plaintiff commenced a civil action against her three children, namely:

(a) Bala Krishnan a/l Muthu ('the first defendant');

(b) Kaliamah a/p Muthu ('the second defendant'); and

(c) Vasanthi a/p Muthu ('the third defendant').

[4] The plaintiff sought against the defendants for the following orders:

(a) Deklarasi bahawa Defendan-Defendan memegang hartanah Lot No 5366, Mukim 12, Daerah Barat Daya, Pulau Pinang yang terkandung dalam Geran No 28569 bersama dengan sebuah rumah beralamat No 10, Jalan 4, Jalan Pantai Jerjak, Sungai Nibong, 11900 Bayan Lepas, Pulau Pinang sebagai pemegang amanah kepada Plaintiff;

(b) Perintah bahawa Pentadbir Hakmilik Tanah membata/kan nama Defendan-Defendan sebagai pemilik berdaftar Lot No 5366, Mukim 12, Daerah Barat Daya, Pulau Pinang yang terkandung dalam Geran No 28569 bersama dengan sebuah rumah beralamat No 10, Jalan 4, Jalan Pantai Jerjak, Sungai Nibong, 11900 Bayan Lepas, Pulau Pinang;

(c) Perintah bahawa Lot No 5366, Mukim 12, Daerah Barat Daya, Pulau Pinang yang terkandung dalam Geran No 28569 bersama dengan sebuah rumah beralamat No 10, Jalan 4, Jalan Pantai Jerjak, Sungai Nibong, 11900 Bayan Lepas, Pulau Pinang diletak hak dan didaftarkan atas nama Plaintif,·

(d) Perintah bahawa sehingga penyelesaian tindakan ini, Defendan-Defendan atau wakil atau ejen mereka diha/ang daripada memindahmilik atau menjual atau apa jua cara Lot No 5366, Mukim 12, Daerah Barat Daya, Pulau Pinang yang terkandung dalam Geran No 28569 bersama dengan sebuah rumah beralamat No 10, Jalan 4, Jalan Pantai Jerjak, Sungai Nibong, 11900 Bayan Lepas, Pulau Pinang kepada pihak ketiga;

(e) Kos; dan

(f) Relif-relif selanjutnya atau lain yang dianggap sesuai dan wajar.

[5] The plaintiff is the mother of the three defendants. The subject matter of the dispute is a piece of property described as Lot No 5366, Mukim 12, Daerah Barat Daya, Pulau Pinang; Geran No 28569 ('the property'). The address of the property is No 10, Jalan 4, Jalan Pantai Jerejak, Sungai Nibong, 11900 Bayan Lepas, Pulau Pinang on which a house is erected.

[6] On 19 September 1978, a sale and purchase agreement was entered between Oriental Realty Sdn Bhd ('the developer') and one Leong Fouk You, the purchaser of the property. The purchase price for the property was RM65,000. On 19 September 1986 the three defendants purchased the property from Leong Fouk You for RM120,000. A memorandum of transfer ('Form 14A') was then executed for the registration of the defendants as the owners of the property. Subsequently Form 16A dated 21 March 1988 was executed for the creation and registration of a charge over the property in favour of Boon Siew Finance Bhd as security for loan granted to the defendants. The loan amount was RM60,000. The charge was registered on 23 March 1988 over the property and on 2 May 1989 the first, second and third defendants became the registered proprietors of the property. On 14 November 1990 the loan was settled and the charge over the property was discharged.

[7] It is the contention of the plaintiff that she had contributed RM40,000 out of the RM60,000 that was paid as partial advance of the purchase price. Her children contributed the balance of RM20,000 in the manner described as follows:

(a) Bala Krishnan a/l Muthu ('the first defendant) — RM1,000;

(b) Kaliamah a/p Muthu ('the second defendant') — RM7,000;

(c) Vasanthi a/p Muthu ('the third defendant') — RM6,000; and

(d) Saraswathy a/p Muthu — RM6,000.

[8] The second defendant, however, contended that she was the one who had paid the initial advance of RM60,000 and the balance was settled through a loan which she obtained from Boon Siew Finance Bhd. She had testified that had a steady source of income and was able to contribute and pay the aforesaid sum as well as serviced the loan. The second defendant denied of any intention to create a trust or the existence of a trust.

[9] After the commencement of the proceeding during a case management a consent judgment dated 23 March 2015 was entered between the plaintiff and the first and third defendants before the senior assistant registrar. The terms of the consent judgment are as follows:

(a) declaration that the first and third defendants held the property in trust for the plaintiff;

(b) an order that the registrar of title cancel the names of the first and third defendant as the registered owner of the property; and

(c) an order that the plaintiff be registered as the owner of the property substituting the first and third defendants.

THE HIGH COURT DECISION

[10] The hearing proceeded only against the second defendant. At the conclusion of the trial, after hearing the parties and having considered their respective submissions, the learned judicial commissioner entered judgment in favor of the plaintiff. Based on the evidence before him both the plaintiff and the second defendant failed to adduce any documentary proof to support their respective contentions, in particular, that they had paid the advance for the purchase of the property. The learned judicial commissioner, however, found on facts that the plaintiff's testimony is to be believed that she was the one who paid on reasons stated at para 17(a)–(f) in his grounds of judgment.

[11] Despite the stark absence of any contemporaneous documentary evidence the learned judicial commissioner found that the plaintiff had paid the advance for the purchase of the property. His Lordship invoked the doctrine of resulting trust and held that the second defendant is a nominal owner possessing no beneficial rights over the property. He concluded that based on the terms of the consent judgment dated 23 March 2015 the first and the third defendants held the property in trust for the plaintiff, their mother.

[12] It is also the findings of the learned judicial commissioner that since the plaintiff had paid for the property the beneficial owner results to the plaintiff. The second defendant merely hold the property in trust in the plaintiff's favour. The plaintiff was, therefore, entitled to call for the transfer of the remaining share in the property to her and compel the second defendant to do so.

THE APPEAL

[13] Although learned counsel for the second defendant raised several grounds in the memorandum of appeal, during the course of arguments before us, learned counsel for the second defendant focused his submissions on the following grounds:

(a) the second defendant has indefeasible title over the property and that cannot be ousted unless challenged;

(b) the High Court made a finding on an issue and/or fact that was not pleaded, the existence of the resulting trust;

(c) the second defendant has contributed to the purchase price of the property and therefore she holds legal and beneficial ownership over the property; and

(d) the High Court failed to appreciate that the consent judgment entered between the plaintiff with the first and third defendants has no consequences whatsoever on the second defendant.

[14] We will address each ground advanced by learned counsel for the second defendant in turn.

THE PARTIES' COMPETING SUBMISSIONS

The second defendant has indefeasible title over the property

[15] Learned counsel for the second defendant submitted that the second defendant is the registered proprietor of the property together with her siblings. By virtue of s 340(1) of the National Land Code ('the NLC') the second defendant as the registered proprietor is vested with indefeasible title over the property. In his submission learned counsel for the second defendant highlighted that the learned judicial commissioner in his grounds of judgment had recognised that indefeasible title vested upon the second defendant. He further submitted that the indefeasible title of the second defendant over the property can only be ousted if there was a specific challenge to her title under any of the grounds as specified in s 340(2) of the NLC. The plaintiff, however, in her statement of claim did not plead any of the circumstances as stated in s 340(2) of the NLC neither was her case premised on any of the grounds upon

which the second defendant's indefeasible title could be challenged under the said provision of the NLC.

[16] In reply, learned counsel for the plaintiff submitted that since this involved a trust, s 340 of the NLC is not applicable.

The High Court made a finding on an issue and/or fact that was not pleaded the existence of the resulting trust

[17] It is submitted by learned counsel for the second defendant that the learned judicial commissioner fell into error in deciding that there was a resulting trust in favour of the plaintiff as the plaintiff did not plead the creation of a trust and the existence of a resulting trust.

[18] In response learned counsel for the plaintiff argued that the second defendant should have challenged the consent judgment. Furthermore, there was no supporting evidence adduced by the second defendant that she had paid the entire sum for the purchase of the property. Learned counsel for the plaintiff in his reply submission referred to para 8 of the statement of claim to show that that the plaintiff had in fact pleaded the creation of a trust.

OUR FINDINGS

The second defendant has indefeasible title over the property

[19] Section 340(2) of the NLC provides:

> (2) The title or interest of any such person or body shall not be indefeasible —
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

[20] The second defendant's indefeasibility of title can only be challenged on any of the grounds provided in s 340(2) of the NLC. The Federal Court in *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269 had made it very clear that indefeasibility:

> ... is central to the system of registration of title under the Torrens system. Raja Azlan Shah (as His Royal Highness then was) in *PTJV Denson (M) Sdn Bhd v Roxy (M) Sdn Bhd* [1980] 2 MLJ 136; [1980] 1 LNS 55 observed that 'the concept of

indefeasibility of title is so deeply embedded in our land law that it seems almost trite to restate it'. Indefeasibility is defined by the Privy Council in *Frazer v Walker* [1967] AC 569 at p 580 to mean:

> The expression not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims *in personal*. These are matters not to be overlooked when a total description of his rights is required. But as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him.

[21] Indefeasibility of title can only be challenged under the circumstances as provided in s 340(2) of the NLC. In the statement of caim and based on the evidence adduced during the trial there was no allegation by the plaintiff that there was fraud or misrepresentation neither was there any allegation that the registration of the title was obtained by the second defendant by forgery.

[22] We observed that the learned judicial commissioner in his grounds of judgment had acknowledged that the second defendant is one of the registered owners of the property and has indefeasibility of title:

> [19] Berdasarkan kepada geran hartanah tersebut, Defendan Kedua adalah salah seorang daripada pemilik berdaftar hartanah tersebut. Dalam keadaan biasa, hakmilik berdaftar bagi hartanah tersebut adalah tidak boleh disangkal (rujuk seksyen 340(1) Kanun Tanah Negara). Sebaliknya Plaintif bukan merupakan sa/ah seorang pemilik berdaftar hartanah tersebut.

[23] In the Federal Court case of *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768; [2014] 1 CLJ 987 His Lordship Jeffrey Tan FCJ succinctly explained:

> Under s 340(2), the title or interest shall not be indefeasible (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law. A title or interest that is not indefeasible continues to be defeasible and is 'liable to be set aside in the hands of any person or body to whom it may subsequently be transferred' (s 340(2)(a)) and any interest subsequently granted there out is 'liable to be set aside in the hands of any person or body in whom it is for the time being vested (s 340(2)(b)). A defeasible title or interest continues to be defeasible and will only become indefeasible when title is acquired by a subsequent purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser (proviso to

s 340(3))'.

[24] The learned judicial commissioner, with respect, failed to consider that the circumstances as expressly provided in s 340(2) of the NLC was not pleaded in the statement of claim of the plaintiff to impugn the legal title of the second defendant. His Lordship instead questioned the defeasibility of title of the second defendant based on other considerations. Since the second defendant's title has not, at any point of time, become defeasible by reason of s 340(2) of the NLC or other grounds of equity, it remains untainted and thus, indefeasible. Being indefeasible, the second defendant's claim to one third share of the property is unimpeachable under s 340 of the NLC.

The High Court made a finding on an issue and/or fact that was not pleaded the existence of the resulting trust

[25] Learned counsel for the second defendant argued that the plaintiff failed to plead that the intention was to create a trust and that a resulting trust existed in favour of the plaintiff. In his reply submission before us learned counsel for the plaintiff referred to para 8 of the statement of claim to show the intention of the plaintiff to create a trust. Paragraph 8 of the statement of claim states as follows:

> Plaintif mengatakan memandangkan beliau tidak mempunyai pekerjaan tetap dan pendapatan yang diperolehi adalah hanya daripada hasil penjualan susu, Plaintif telah menggunakan nama Defendan-Defendan untuk membeli hartanah tersebut.

[26] We have scrutinised para 8, in particular, and the entire statement of claim carefully and we found it to be barren of any particulars of any intention of creating a trust by the plaintiff. Despite that the statement of claim is devoid of any plea on the creation of a trust and the existence of a resulting trust the learned judicial commissioner came to the conclusion that a resulting trust existed based on the terms of the consent judgment entered between the plaintiff with the first and third defendants.

[27] The Federal Court in the case of *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381 held that:

> ... In our judgment, the primary function of the court in a case where a resulting trust is asserted or a gift is alleged arising from a disposition of property is clear. It is to determine whether the initial disponor intended to make a gift of the property be it movable or immovable, or whether he or she intended it to be held by the dispone in trust for some other person or persons, including the disponor or the dispone or both. A court when called upon to decide whether a resulting trust or a gift was intended in given circumstances should not begin by resorting to presumptions. It must meticulously examine the facts to objectively ascertain the true intention of the parties. If the intention of the parties when objectively determined was that the

> particular property was to be held on a resulting trust then that is the conclusion the court should declare. However, if the intention was that the dispone of the property was to have it as a gift, there can then be no question of a resulting trust being implied. It is only when there is absent any indication of what was intended by the parties that the court should resort to presumptions. Were it otherwise, the court may be arriving at an incorrect conclusion based on a presumption when the evidence points in quite the opposite direction.

[28] The facts as to the plaintiffs intention to create a trust must first of all be established. For a trust to exist and binding, the donor must make his intention clear in that at the time of its creation there must be certainty of beneficial interest. Applying the principle in *Takako Sakao*, this court has a duty to determine whether the plaintiff as the donor intended the property to be held by the second defendant as donee in trust for the plaintiff. The onus of proof lies squarely on the plaintiff to prove strictly by a preponderance of evidence the exact intention of the parties at the material time when the property was purchased. We find that there was not an iota of evidence before the judicial commissioner of such an intention to create a trust at the time the property was purchased.

[29] In the absence of any documentary evidence the court must therefore rely on the testimony of not only the plaintiff's witnesses but that of the second defendant as well. We find that the learned judicial commissioner was largely influenced by the fact that the plaintiff had contributed towards the purchase of the property even though there was no documentary proof that she had paid RM40,000 for the said property and that the second defendant had merely contributed RM7,000. The second defendant had contended that she had paid RM60,000 and had serviced the monthly payment.

[30] The sole basis for the learned judicial commissioner's finding was based purely on the fact that the plaintiff testified that she had paid for everything in relation to the purchase of the property:

> [24] Dari keterangan yang telah saya bincangkan sebelum ini, disebabkan Plaintif telah membayar harga belian hartanah sepenuhnya maka tindakan Plaintif mendaftarkan hartanah tersebut atas nama Defendan-Defendan hanya memberikan hakmilik nominal kepada mereka. Hakmilik benefisial masih terletak pada Plaintif. lni adalah satu kes pembelian hartanah atas nama orang lain tanpa ada niat untuk menghadiahkan hartanah tersebut kepada orang yang hartanah tersebut didaftarkan hakmiliknya yang boleh dikategorikan sebagai amanah berbangkit (resulting trust).

[31] This court in *Heng Gek Kiau v Goh Koon Suan* [2007] 6 CLJ 626, held that the correct approach in cases of this nature is:

> ... for the court first to determine the true intention of the purchaser. The question whether the purchaser in a particular case had a donative intention is to be determined objectively through a meticulous examination of the facts and evidence of the surrounding circumstances. If after such an examination the court concludes that there was a donative intention on the part of the purchaser that is the end of the matter and there is no room for the presumption of resulting trust or advancement as the case may be. It is only where there are no or insufficient facts or evidence from which a fair inference of intention may be drawn that a court should turn to presumption as a last resort.

[32] We have meticulously examined the evidence, both oral and documentary and we found that there were no affirmative acts on the part of the plaintiff of any intention to create a trust and that her children will hold the property in trust in her favor.

The second defendant has contributed to the purchase price of the property and therefore she holds legal and beneficial ownership over the property

[33] It can be discerned from the evidence that there was no dispute that the second defendant had contributed to the purchase sum. Having contributed to the purchase price we are of the considered view that the second defendant is vested with both legal and beneficial ownership of the property.

The High Court failed to appreciate that the consent judgment entered between the plaintiff and the first and third defendants has no consequences whatsoever on the second defendant

[34] We agree with learned counsel for the second defendant that the consent judgment dated 23 March 2015 only concerns the plaintiff together with the first and third defendants. It does not have any consequence or impact of the second defendant's legal and beneficial rights over the property.

[35] With respect, it is our considered view that the learned judicial commissioner fell into error in finding that based on the consent judgment entered between the plaintiff with the first and third defendants it had strengthened the fact that the second defendant holds the property in trust for the plaintiff. The consent judgment was entered between the plaintiff with the first and third defendants. The aforesaid consent judgment does not in any manner whatsoever affect the second defendant's legal and beneficial rights over the property.

CONCLUSION

[36] In this appeal before us, after having heard the parties at length and upon careful perusal of the records of appeals, we were of the considered opinion that this was a case in which appellate intervention was warranted.

[37] For the foregoing reasons, we unanimously allowed the appeal with no order as to costs. The orders of the High Court were set aside. Deposit to be refunded.

Appeal allowed and High Court order set aside.

Reported by Ashok Kumar